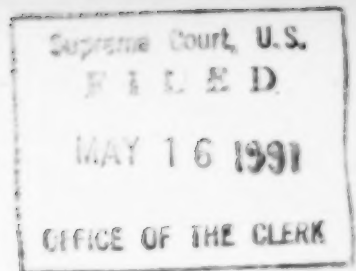


(2)
No. 90-1517



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF OHIO, et al.,

Cross-Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BY THE STATE OF OHIO

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QUESTIONS PRESENTED

1. Whether Section 6001 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6961, waives the sovereign immunity of the United States from assessment of state civil penalties for violation of state hazardous waste laws.*
2. Whether Sections 313 and 505 of the Clean Water Act, 33 U.S.C. 1323 and 1365, waive the sovereign immunity of the United States from assessment of federal civil penalties for violations of the Clean Water Act.

[*Please note that the first Question Presented in the State's Cross-Petition mistakenly cited Section 7002, 72 U.S.C. 6972, when it should have cited Section 6001, 42 U.S.C. 6961. As the Department of Energy ("DOE") noted in Footnote 1 of its Memorandum in Opposition, the State cited the correct section in the body of its Cross-Petition. DOE also cited the correct section in its Questions Presented and Memorandum.]

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REPLY BY THE STATE OF OHIO

The gist of the Department of Energy ("DOE") Memorandum In Opposition with regard to the State's First Question appears to be that Congress' response to *Hancock v. Train*, 426 U.S. 167 (1976), and *EPA v. California*, 426 U.S. 200 (1976), consisted of no more than the addition of "permits" to the coverage of 42 U.S.C. 6961. However, DOE's argument overlooks Congress' addition of "all" to "requirements" in response to this Court's assurance in *Hancock* that use of that term would effectuate a complete, comprehensive waiver. *Hancock*, 426 U.S. at 182. Furthermore, Congress' added "all" "procedural" requirements to the waiver, rather than limiting its language to permits.

By arguing that the specific list of requirements in 42 U.S.C. 6961 excludes by implication the unlisted regulatory provisions, DOE erroneously relies on the principle of *expressio unius est exclusio alterius*. However, this principle is an uncertain guide to statutory construction. *State of Illinois, Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983). Most certainly, this principle should not be applied where other language in the statute demonstrates Congressional intent not to limit the breadth of the coverage to the specifically listed items. Congress' use of the terms "all", "procedural", and "including" in 42 U.S.C. 6961 amply defeats DOE's theory. The decisions of any courts which have adopted DOE's contention, including that of the Court of Appeals below, have misused *expressio unius* in order to defeat the clear intent of Congress.

Even more egregious is DOE's use of *expressio unius* to limit the meaning of "requirements" in RCRA by comparing it to language in the Clean Water Act. Therefore, after using *expressio unius* to erase the intended effect of language within the four corners of RCRA, DOE now seeks to go even a step further and utilize this uncertain principle to compare language in two separate statutes. Because a number of courts have accepted this tenuous argument as their grounds for defeating the Congressionally intended waiver, it is even

more crucial that the Court review this issue.

In the decisions which have eliminated the civil penalty waiver from 42 U.S.C. 6961, those courts have been able to delete penalties only by creating a distinction between "procedural requirements" and "enforcement mechanisms." This distinction undeniably contradicts this Court's opinion in *Hancock*, which repeatedly equates the two terms. These decisions, including that of the Court of Appeals below, refuse to follow the precedent set forth in *Hancock*.

For this reason, and because enforcement of the hazardous waste laws is of such national importance, the State urges the Court to hear this issue.

Respectfully submitted,

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